IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 10, 2009 Session

CHRIS GARNER v. CIVIL SERVICE COMMISSION OF THE METROPOLITAN GOVERNMENT OF NASHVILLE

Appeal from the Chancery Court for Davidson County
No. 07-1121-III Ellen H. Lyle, Chancellor

No. M2008-01902-COA-R3-CV - Filed November 2, 2009

The appellee, a police officer employed by the Metropolitan Nashville Police Department, was terminated based upon a finding that he made a false oral report to his supervisor that was of an official nature in violation of General Order 04-05, Art. VIII (S). The Administrative Judge found that "Officer Garner intentionally lied to Sergeant Chestnut . . . in order to avoid further disciplinary action. Because disciplinary action taken by the Police Department constitutes business of an official nature, any oral or written reports pertaining to or that could result in disciplinary action constitute reports of an official nature." The Civil Service Commission upheld the administrative judge's findings and order. The trial court reversed the Commission, holding that "the Commission's findings of fact that petitioner made false statements to his supervisor are supported by substantial and material evidence but that the Commission erred in its conclusion of law that the statements constituted an official report." It is not disputed that the officer made false statements to his supervisor during four telephone conversations and thereafter in response to questions by this supervisor; the issue is whether any of the false statements to his supervisor constituted "an oral report of an official nature." We have determined that the Commission identified an appropriate legal principle to be applied to the facts of this case, the relevant factual findings by the Commission are supported by substantial and material evidence, and the Commission correctly applied the law to the facts in reaching the decision that the officer's employment should be terminated for violating General Order 04-05, Art. VIII (S). We, therefore, remand with instructions to affirm the decision of the Commission to terminate the appellee's employment with the Police Department.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

J. Brooks Fox and Elizabeth Anne Sanders, Nashville, Tennessee, for the appellant, Civil Service Commission of the Metropolitan Government of Nashville.

P. Brocklin Parks, Nashville, Tennessee, for the appellee, Chris Garner.

OPINION

The matters at issue arise from phone calls made by the appellant, Chris Garner ("Ofc. Garner"), to his supervisor, Sgt. Mark Chestnut ("Sgt. Chestnut") of the narcotics section of Special Investigation Division (SID) of the Metropolitan Nashville Police Department (the "Police Department") on the morning of October 13, 2005, and false statements made by Ofc. Garner in response to Sgt. Chestnut's questions thereafter.

Ofc. Garner had been employed by the Police Department for six years prior to the incident on October 13, 2005. He had been under the direct supervision of Sgt. Chestnut in the narcotics section for just over three months, since July 2005. Significant to the matters at issue, Ofc. Garner had been late for work five times prior to this incident during the brief period Ofc. Garner had worked under the supervision of Sgt. Chestnut. Of further significance is the fact that Ofc. Garner had previously received an oral reprimand from Sgt. Chestnut.

On the day in question, October 13, Ofc. Garner was to report to the SID office in downtown Nashville at 6:15 a.m. to obtain an unmarked vehicle he was to use in a surveillance operation that was to commence that morning. At 6:10 a.m. Ofc. Garner called Sgt. Chestnut via a Nextel cellphone[1] to advise Sgt. Chestnut that he would be late due to "heavy traffic" on the interstate. Sgt. Chestnut responded with "10/4" even though he was suspicious of the reason provided by Ofc. Garner given that Ofc. Garner had been late on five previous occasions and it was most unusual for there to be "heavy traffic" that early in the morning. Ofc. Garner did not hear Sgt. Chestnut respond to the first chirp so he called Sgt. Chestnut again to make sure that Sgt. Chestnut received the message. During the second conversation Sgt. Chestnut informed Ofc. Garner that his vehicle was ready and when he arrived at the SID office he was to transfer his equipment to the unmarked vehicle and drive to join the other participants of the surveillance operation at the briefing location.

Within a minute of the conclusion of the second phone conversation, Sgt. Chestnut called Ofc. Garner to make a further inquiry, specifically to ascertain the cause of the traffic congestion on the interstate. Ofc. Garner stated that he did not know why the traffic was heavy and that he could only drive "about 40 miles per hour" due to the heavy traffic. It was during this third Nextel conversation that Ofc. Garner advised Sgt. Chestnut that he was being pulled over by Tennessee State Trooper Corey Kilpatrick ("Trooper Kilpatrick"); Ofc. Garner reported to Sgt. Chestnut that it was probably due to "expired tags."[2] After the traffic stop, Ofc. Garner called Sgt. Chestnut, as requested, to explain the nature of the stop. In this conversation, the fourth of the morning, Ofc. Garner reported that the Trooper was "a friend" and that he stopped him just to say "hi." Upon further questioning by Sgt. Chestnut, Ofc. Garner admitted that he had been speeding and the reason Trooper Kilpatrick stopped him was because he was traveling 85 miles per hour.

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[1] A Nextel mobile telephone functions like a walkie-talkie; as one person is finished talking, the phone makes a "chirping" sound.

[2] Ofc. Garner was driving his personal vehicle at the time.

Ofc. Garner arrived at the SID office at 6:27 a.m. to obtain the vehicle he was to use in the surveillance operation; he then traveled to the location of the briefing. He was to arrive at 7:00 a.m. for the briefing; he did not arrive at the briefing location until 7:20 a.m.

Sgt. Chestnut subsequently decided to conduct an investigation of what transpired in the early morning of October 13, 2005, specifically regarding the truthfulness or untruthfulness of what Ofc. Garner had told him. Sgt. Chestnut questioned several members of the Police Department who lived near Ofc. Garner and who traveled the same interstate early that morning. None of the officers corroborated Ofc. Garner's statements about heavy traffic. When Sgt. Chestnut subsequently confronted Ofc. Garner about the traffic conditions, Ofc. Garner claimed he was late because of traffic congestion near his house in Rutherford County. He further stated that he left five minutes later than he intended because his wife had taken too long in the bathroom.

Sgt. Chestnut was still suspicious given the time of day Ofc. Garner was traveling to the office, so he drove from Ofc. Garner's house to the office at the same time that Ofc. Garner claimed he left the house. Sgt. Chestnut had no trouble getting to SID prior to 6:15 a.m. To further buttress Sgt. Chestnut's belief that Ofc. Garner was being dishonest, Sgt. Chestnut inquired with the Tennessee Highway Patrol and a Rutherford County dispatcher, both of whom contradicted Ofc. Garner's statements about heavy traffic on the morning of October 13, 2005. Sgt. Chestnut then notified his superiors of what had occurred on the morning of October 13 and what he had learned in his subsequent inquiries.

On January 25, 2006, Police Department Chief Ronal W. Serpas ("Chief Serpas") notified Ofc. Garner via letter, an Internal Incident Report, and a narrative attached thereto, that he was charged with violating the following rules:

1) General Order 04-05, Deportment, Section VIII Official Obligations, "S" False or Inaccurate Reports[3]
2) Civil Service Rule 6.7, Grounds for Disciplinary Action, 13. Dishonesty[4]

In the narrative attached to the Internal Incident Report, the Police Department identified the statements by Ofc. Garner during the Nextel communications and the subsequent investigation the Police Department deemed to be dishonest and for which Ofc. Garner should receive disciplinary action based on "[t]he totality of the circumstances surrounding [the] incident coupled with his habitual tardiness."

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[3] The "General Orders" are Police Department departmental rules. The Police Department is obligated to follow the Civil Service Rules; however, the Civil Service Rules authorize departments to implement additional rules to govern their departments. Civil Service Rule 1.10.

[4] This is merely a reference; no specific punishment was recommended based on the violation of this rule. Civil Service Rule 6.7 lists the specific type of behavior that would warrant disciplinary action. It does not specifically list which behavior should result in a particular disciplinary action.

Pursuant to the applicable disciplinary procedures, as stated in a Disciplinary Action form, Ofc. Garner was afforded a pre-termination hearing before Deputy Chief Honey Pike and the Police Department Disciplinary Board on February 22, 2006. The Disciplinary Action form listed the incident as follows:

> On October 13, 2005, Off. Garner was late for work and was not truthful concerning the reason for his tardiness. Officer Garner was given an opportunity to be truthful and accept responsibility for being tardy, but chose not to which resulted in a full investigation.

At the conclusion of the pre-termination hearing, the Board recommended Ofc. Garner be immediately terminated for violating the above-referenced rules. Specifically, Ofc. Garner was found guilty of General Order 04-05, Art. VIII (S) for providing a false or inaccurate report to his supervisor. This subsection expressly provides that "[e]mployees shall not knowingly make or allow or cause to be made a false or inaccurate oral or written report of an official nature." A violation of this rule is a "Category AA" offense punishable by dismissal. The Board also recommended a two-day suspension for his tardiness and a two-day suspension for his failure to adhere to the laws for speeding on his way to work.[5] Deputy Chief Pike approved the recommendations of the Board; Ofc. Garner filed an appeal of this determination.

A hearing was held before an administrative judge on June 13, 2006. During the hearing, Ofc. Garner stated that he accepted responsibility for his tardiness and speeding and the four-day suspension for the two infractions, and that his appeal was limited to the termination for violating General Order 04-05, Art. VIII (S). In that appeal, Ofc. Garner contended that his statements to Sgt. Chestnut regarding the reason for his tardiness and the reason for the traffic stop by Trooper Kilpatrick did not qualify as "oral or written report[s] of an official nature;" therefore, he did not violate the General Order.

On November 21, 2006, the administrative judge filed an Initial Order finding that "Officer Garner intentionally lied to Sergeant Chestnut . . . in order to avoid further disciplinary action. Because disciplinary action taken by the Police Department constitutes business of an official nature, any oral or written reports pertaining to or that could result in disciplinary action constitute reports of an official nature." The administrative judge also found that Ofc. Garner lied to his supervisor during the following relevant times:

> 19. Officer Garner lied to Sergeant Chestnut during both the first and third chirp communications when he reported that he was going to be late to work because he was caught up in rush hour traffic, the "traffic was slow," and that he was driving "about 40 miles per hour." . . .

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[5] The Board also found Ofc. Garner guilty of violating Civil Service Rule 6.7, Grounds for Disciplinary Action, 11. Violation of any written rules, policies or procedures of the department in which the employee is employed. No punishment was specified for this violation. It was listed in the section with the other suspensions.

> 20. The fourth chirp communication occurred after Officer Garner had been pulled over for speeding by Trooper Kilpatrick. During this conversation, Officer Garner again lied to Sergeant Chestnut when he explained that the State Trooper had not seen Officer Garner on the interstate in a while and that he had just stopped him "to say hi."

The administrative judge further found that on October 13, 2005, "Officer Garner lied to Sergeant Chestnut about (1) his reason for being late to work, and (2) the reason Trooper Kilpatrick pulled him over" and "[a]s a police officer, any and all statements made within the scope of his employment are reports of an official nature."

Thereafter, the Civil Service Commission of the Metropolitan Government of Nashville, Davidson County, Tennessee, ("Commission"), during a regular meeting on March 13, 2007, upheld the administrative judge's Initial Order. As a consequence, Ofc. Garner's employment with the Police Department was terminated.

Ofc. Garner timely filed a Petition for Review pursuant to Tenn. Code. Ann. § 4-5-322 in the Chancery Court for Davidson County on May 17, 2007. On July 8, 2008, the trial court reversed the Commission and held that "the Commission's findings of fact that petitioner made false statements to his supervisor are supported by substantial and material evidence but that the Commission erred in its conclusion of law that the statements constituted an official report." The trial court determined that the Nextel communications between Ofc. Garner and Sgt. Chestnut were too informal to qualify as being "of an official nature." In applying the General Order to the facts of this case, the trial court explained:

> The rule, when read as a whole and giving effect to all the words as the Court is required to do, is designed to cover a situation in which a police officer has to make a report on an incident, such as a traffic stop or an arrest. In such situations, false statement by police officers warrant automatic dismissal . . . . Stretching the general order to apply in the employment context would mean that the false statements, in this case for example, would have to have been made when petitioner was called into Sgt. Chestnut's office to respond to an investigation of the incident. Those circumstances would approach the "of an official nature" required by the terms of the general order. The Commission found, however, that petitioner violated the general order by making false statements during the Nextel communications.

This appeal by the Commission followed. The only issue presented on appeal is whether the trial court erred in not giving great deference and controlling weight to the Police Department's interpretation of its own rules.

STANDARD OF REVIEW

Judicial review of decisions of local civil service commissions is governed by the narrow standard contained in Tenn. Code Ann. § 4-5-322(h) rather than the broad standard of review used in other civil appeals. *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279-80 (Tenn. Ct. App. 1988). A court will modify or reverse the decision of the commission if the petitioner's rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5) (A) Unsupported by evidence which is both substantial and material in the light of the entire record.
> (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

In reviewing a commission's decision, the court must engage in a three-step analysis. First, the court must determine whether the agency identified the appropriate legal principles applicable to the case. *McEwen v. Tennessee Dept. of Safety*, 173 S.W.3d 815, 820 (Tenn. Ct. App. 2005). Second, the court must examine the commission's factual findings to determine whether the findings are supported by substantial and material evidence. *Id*. Finally, the court must examine how the commission applied the law to the facts. *Id*. The final step of this analysis involves mixed questions of law and fact; therefore, the courts must give deference to the commission. *Miller v. Civil Serv. Comm'n*, 271 S.W.3d 659, 665 (Tenn. Ct. App. 2008) (citing *Armstrong v. Metro Nashville Hosp. Auth.*, No. M2004-01361-COA-R3-CV, 2006 WL 1547863, at *2 (Tenn. Ct. App. June 6, 2006) (no Tenn. R. App. P. 11 application filed)). Accordingly, the court must determine whether the commission's decision is supported by "such relevant evidence as a rational mind might accept to support a rational conclusion." *Clay County Manor v. State Dep't of Health & Env't*, 849 S.W.2d 755, 759 (Tenn. 1993); *Southern Ry. v. State Bd. of Equalization*, 682 S.W.2d 196, 199 (Tenn. 1984).

Thus, when we review the decision of the trial court, we are to determine whether the trial court properly applied the standard of review found at Tenn. Code Ann. § 4-5-322(h). *See Jones v. Bureau of TennCare*, 94 S.W.3d 495, 501 (Tenn. Ct. App. 2002) (quoting *Papachristou v. Univ. of Tennessee,* 29 S.W.3d 487, 490 (Tenn. Ct. App. 2000)).

Analysis

The dispositive issue is whether the Commission correctly applied the Police Department's disciplinary policy, specifically General Order 04-05, Art. VIII (S), to the facts of this case.

There is substantial and material evidence in the record to support the Commission's finding that Ofc. Garner made several false statements to Sgt. Chestnut during their Nextel conversations on October 13, 2005, and the inquiries by Sgt. Chestnut thereafter. The question to be answered in this opinion is whether these false statements were or were not "of an official nature," which is an essential element of the offense specified in General Order 04-05, Art. VIII (S).

In pertinent part, subsection "S" expressly provides that "[e]mployees shall not knowingly make or allow or cause to be made a false or inaccurate oral or written report of an official nature." General Order 04-05, Art. VIII (S).

The Commission made two determinations that require our attention. The Commission found that "Officer Garner intentionally lied to Sergeant Chestnut . . . in order to avoid further disciplinary action. Because disciplinary action taken by the Police Department constitutes business of an official nature, any oral or written reports pertaining to or that could result in disciplinary action constitute reports of an official nature." The Commission also made the determination that "any and all statements made within the scope of [Ofc. Garner's] employment are reports of an official nature." We will first turn our attention to the Commission's interpretation of its rule that "any and all statements made within the scope of [Ofc. Garner's] employment are reports of an official nature."

When judicial review involves a commission's construction of a rule or regulation, the court must give great weight to the commission's interpretation of its own rules. *Envtl. Defense Fund v. Tenn. Water Quality Control Bd.*, 660 S.W.2d 776 (Tenn. Ct. App. 1983) (citations omitted). Only when a commission's interpretation of a rule is plainly erroneous, inconsistent with the plain language of the rule, or has no reasonable basis in the law should the courts decline to adopt a commission's interpretation. *Miller*, 271 S.W.3d at 665-66 (citing *Jackson Express, Inc. v. Tenn. Pub. Serv. Comm'n*, 679 S.W.2d 942, 945 (Tenn. 1984); *Cawthorn v. Scott*, 400 S.W.2d 240, 242 (Tenn. 1966); *Waste Mgmt., Inc. of Tenn. v. Solid Waste Region Bd.*, M2005-01197-COA-R3-CV, 2007 WL 1094131, at *3 (Tenn. Ct. App. Apr. 11, 2007) (no Tenn. R. App. P. 11 application filed)).

The Commission's determination that the Police Department has an official policy that "any and all statements made within the scope of [Ofc. Garner's] employment are reports of an official nature" is an erroneous interpretation of the rule. This determination was based on the erroneous belief that the Police Department has a "policy of zero tolerance" for untruthful behavior by a police officer. It does not. The official policy stated in General Order 04-05, Art. VIII (S) provides that "[e]mployees shall not **knowingly** make or allow or cause to be made a false or inaccurate **oral** or written **report of an official nature**."(emphasis added). The phrase "of an official nature" is a limiting phrase and, thus, it should not have been included in the policy had it been the intent of the Police Department to have a "zero tolerance policy" concerning "any and all false statements made

within the scope of employment." Whether it was intended or not, the official policy against making false statements or reports is limited to those that are of an official nature. Accordingly, we have determined that the Commission erroneously determined that "any and all statements made within the scope of [Ofc. Garner's] employment are reports of an official nature." *See McEwen*, 173 S.W.3d at 820.

Because the limiting phrase "of an official nature" is an integral component of General Order 04-05, Art. VIII (S), the dispositive issue is whether Ofc. Garner's false statements were or were not "of an official nature." The parties have not cited to any Tennessee authority that defines what constitutes a report of an official nature and we have not found any authority in Tennessee that provides guidance in making such a determination in this case. We have, however, found persuasive authority from the State of Louisiana that provides guidance in our effort to determine whether Ofc. Garner's statements were "of an official nature." Particularly on point is the reasoning of the Louisiana Court of Appeals in *Rodriguez v. Bd. of Comm'ners, Port of New Orleans*, 344 So.2d 436, 439 (La. Ct. App. 1977).[6] In *Rodriguez*, a Harbor Police officer was charged with violating rules of the Harbor Police Department that provided in pertinent part: "'A member shall be truthful in his conduct towards all persons.' Chapter B, Art. 10(e); and 'A member shall not knowingly make, or cause or allow to be made, a false or inaccurate oral report or written record *of an official nature*.' Chapter B, Art. 15(d)." *Id*. (emphasis added). Although the rule in *Rodriguez* was more expansive than General Order 04-05, Art. VIII (S) of the Metropolitan Police Department due to the additional provision that "A member [of the Harbor Police] *shall be truthful in his conduct towards all persons*," the *Rodriguez* court recognized that "[n]ot all conduct, however disapproving, will or is likely to impede the efficiency of the public service." *Id*. We agree.

When Ofc. Garner placed the first Nextel phone call to his immediate supervisor to advise the supervisor that he would be late, Ofc. Garner knew he might be disciplined because he had been disciplined recently for being tardy. Thus, when he falsely reported to his immediate supervisor that he would be late due to "heavy traffic," it was to avoid further discipline. To aggravate the matter, he repeatedly provided false reports to his immediate supervisor during the next three Nextel communications to avoid discipline and he continued to falsely answer questions presented by Sgt. Chestnut during the ensuing investigation. The purpose of Sgt. Chestnut's investigation was to determine whether to impose disciplinary measures for what appeared to have been false statements (oral reports) on the morning of October 13, 2005. As the Commission correctly found, the matter of discipline within the Police Department is an official matter. Accordingly, Ofc. Garner was untruthful with Sgt. Chestnut regarding an official matter. We, therefore, affirm the finding by the

[6] In two other opinions, the Louisiana Supreme Court reasoned that a false statement or report must have "a real and substantial relation to the efficiency of the public service" for it to be of an "official" nature. *See Leggett v. Northwest State College*, 140 So.2d 5, 9-10 (La. 1962); *see also Brickman v. New Orleans Aviation Bd.*, 107 So.2d 422, 428 (La. 1959). "Legal cause for disciplinary action exists if the facts found by the commission disclose that the conduct of the employee impairs the efficiency of the public service. Of course there must be a real and substantial relation between the conduct of the employee and the efficient operation of the public service; otherwise legal cause is not present, and any disciplinary action by the commission is arbitrary and capricious." *Leggett*, 140 So.2d at 9-10.

Commission that Ofc. Garner violated General Order 04-05, Art. VIII (S) by making false reports to his supervisor of an official nature.

There is substantial and material evidence in the record to support the Commission's findings that Ofc. Garner made false reports to his immediate supervisor in a failed attempt to avoid disciplinary action and that the false statements were of an official nature. We further affirm the Commission's conclusion that Ofc. Garner violated General Order 04-05, Art. VIII (S) by making false reports of an official nature. A violation of General Order 04-05, Art. VIII (S) constitutes a "Category AA" offense punishable by termination of employment; therefore, termination of Ofc. Garner's employment was in compliance with the official policies of the Police Department.

IN CONCLUSION

We remand this matter to the trial court with instructions to enter judgment affirming the decision of the commission terminating Ofc. Garner's employment with the Police Department for violating General Order 04-05, Art. VIII (S). Costs of appeal are assessed against the appellee, Chris Garner.

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FRANK G. CLEMENT, JR., JUDGE